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No. 01-400

IN THE
# Supreme Court of the United States

RICKY BELL, WARDEN

*Petitioner,*

V.

GARY BRADFORD CONE,

*Respondent.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

## BRIEF OF RESPONDENT

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## QUESTIONS PRESENTED FOR REVIEW

1. Did the United States Court of Appeals for the Sixth Circuit, after holding that the rule of *United States v. Cronic*, 466 U.S. 648 (1984), controls Gary Cone's case, correctly determine that the state courts' choice of the wrong Sixth Amendment Rule is contrary to clearly established federal law under 28 U.S.C. §2254(d)(1)?

2. In analyzing Gary Cone's Sixth Amendment claim, did the United States Court of Appeals for the Sixth Circuit correctly apply *United States v. Cronic*, 466 U.S. 648 (1984), and presume prejudice upon finding counsel failed to subject Gary Cone's sentence of death to meaningful adversarial testing, by not presenting mitigating evidence and waiving closing argument in the penalty phase of a capital trial?

## TABLE OF CONTENTS

Questions Presented for Review . . . . . i
Table of Contents . . . . . ii-iii
Table of Authorities . . . . . iv-vi
Statement of the Case . . . . . 1
*Sentencing Proceedings* . . . . . 1
*State Post Conviction Proceedings* . . . . . 4
*Habeas Corpus Proceedings* . . . . . 9
Summary of the Argument . . . . . 12
Argument . . . . . 16
I. THE A.E.D.P.A. DOES NOT BAR HABEAS RELIEF IN THIS CASE, SINCE THE STATE COURTS' CHOICE OF THE WRONG SIXTH AMENDMENT RULE IS CONTRARY TO CLEARLY ESTABLISHED FEDERAL LAW . . . . 16
II. THE UNITED STATES COURT OF APPEALS CORRECTLY PRESUMED PREJUDICE UNDER *US. v. CRONIC* IN ANALYZING GARY CONE'S SIXTH AMENDMENT CLAIM . . . . . 18
A. The Sixth Amendment guarantees a criminal defendant the right to the effective assistance of counsel . . . . . 18
B. This Court has established different rules for analyzing Sixth Amendment claims, depending upon whether counsel is completely denied, constructively denied, or counsel commits specific errors in representation . . . . . 19
C. When a lawyer abandons his duty to present a case for life in the penalty phase of a capital trial, the rule of *Cronic* applies . . . . . 25



## TABLE OF CONTENTS

1. *In a capital sentencing proceeding, the lawyer must make a case for life* . . . . . 26
2. *Dice failed to present a case for Gary Cone's Life.* . . . . . 28
3. *Dice's post hoc justifications for his failure to present a case for life are convoluted and confusing* . . . . . 32
4. *Petitioner's arguments that Dice engaged in advocacy during the penalty phase have no merit in light of Dice's failure to make a case for life before the jury* . . . . . 35
5. *This Court's precedents do not justify applying Strickland rather than Cronic in a case where a lawyer utterly failed to make a case for life in the penalty phase of a capital case* . . . . . 37
III. IF THE COURT CONCLUDES THAT THE SIXTH CIRCUIT ERRED IN GRANTING HABEAS RELIEF UNDER *CRONIC*, IT SHOULD REMAND THIS CASE TO THE COURT OF APPEALS FOR CONSIDERATION OF GARY CONE'S SIXTH AMENDMENT CLAIMS UNDER *STRICKLAND* . . . . . 44
Conclusion . . . . . 50

## TABLE OF AUTHORITIES

**Cases**

*Anders v. California*, 386 U.S. 738 (1967) . . . . . 21
*Avery v. Alabama*, 308 U.S. 444 (1940) . . . . . 19
*Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001) . . . 23
*Burger v. Kemp*, 483 U.S. 776 (1987). . . . . 39
*Cone v. State*, 927 S.W. 2d 579 (Tenn. Crim. App. 1995) . . . . . 9, 47
*Cox v. State*, 880 S.W. 2d 713 (Tenn Crim. App. 1994) . . . . . 28
*Cozzolino v. State*, 584 S.W. 2d 765 (Tenn. 1979). . . . . 6, 34, 35
*Darden v. Wainwright*, 477 U.S. 168 (1986) . . . . . 39
*Eddings v. Oklahoma*, 455 U.S. 104 (1982). . . . . 26
*Ford v. Georgia*, 498 U.S. 411 (1991). . . . . 47
*Gideon v. Wainwright*, 372 U.S. 335 (1963). . . . . 18
*Gilbert v. Homar*, 520 U.S. 924 (1997). . . . . 44
*Groseclose v. Bell*, 130 F.3d 1161 (6th Cir. 1997) . 27, 28
*Herring v. New York*, 422 U.S. 853 (1975) . . . 21, 30, 31
*Lee v. Kemna*, 70 USLW 4104 (US Jan. 22, 2002). . . 47
*Lockhart v. Fretwell*, 506 U.S. 364 (1993) . . . . . 10, 15, 17, 46
*Lockett v. Ohio*, 438 U.S. 586 (1978) . . . . . 26
*McMann v. Richardson*, 397 U.S. 759 (1970) . . . . . 19
*N.A.A.C.P. v. Alabama ex rel Patterson*, 357 U.S. 449 (1958). . . . . 47
*Owens v. State*, 908 S.W. 2d 923 (Tenn. 1995). . . . . 48
*Penry v. Lynaugh*, 492 U.S. 302 (1989) . . . . . 27, 33



## TABLE OF AUTHORITIES

*Powell v. Alabama*, 287 U.S. 45 (1932) . . 19, 23, 24, 25
*Rickman v. Bell*, 131 F.3d 1150 (6th Cir. 1997) . . . . . 22, 27, 28
*Roe v. Flores-Ortega*, 528 U.S. 470 (2000) . . . . . 20, 21, 41, 42, 43
*Selvage v. Collins*, 494 U.S. 108 (1990) . . . . . 49
*Skipper v. South Carolina*, 476 U.S. 1 (1986) . . . . . 26
*Smith v. Robbins*, 528 U.S. 259 (2000) . . . . . 40, 41
*South Carolina v. Catawba Indian Tribe, Inc.* 476 U.S. 498 (1986). . . . . 49
*State v. Bibbs*, 806 S.W. 2d 786 (Tenn. Crim. App. 1991) . . . . . 28
*State v. Cone*, 665 S.W. 2d 87 (Tenn. 1984) . . . . . 3
*State v. Thompson*, 2001 W.L. 912715 (Tenn. Crim. App. 2001) . . . . . 28
*Strickland v. Washington*, 466 U.S. 668 (1984) . *passim*
*Teague v. State*, 772 S.W. 2d 915 (Tenn. Cr. App. 1988). . . . . 48
*United States v. Ash*, 413 U.S. 300 (1973). . . . . 19
*United States v. Cronic*, 466 U.S. 648 (1984) . . . *passim*
*Williams* (Terry) *v. Taylor*, 529 U.S. 362 (2000). 11, 15, 16, 17, 18, 39, 40, 45, 46
*Williams* (Michael) *v. Taylor*, 529 U.S. 420 (2000). . . 48
*Wright v. West*, 505 U.S. 277 (1992). . . . . 44
*Ylst v. Nunnemaker*, 501 U.S. 797 (1991) . . . . . 46

## TABLE OF AUTHORITIES

**United States Constitution**
U.S. Const. Amend. VI . . . . . *passim*

**United States Code:**
28 U.S.C. §2254(d) . . . . . 10, 16, 18, 44
28 U.S.C. §2254(d)(1) . . . . . 11, 15, 16

**Tennessee Code Annotated:**
Tenn. Code Ann. §39-2404 (i) (2) (1977). . . . . 1
Tenn. Code Ann. §39-2404 (i) (3) (1977). . . . . 1, 3
Tenn. Code Ann. §39-2404 (i) (5) (1977). . . . . 1
Tenn. Code Ann. §29-2404 (i) (6) (1977). . . . . 1
Tenn. Code Ann. §40-30-112(a) (1990)(repealed) . . . . 47
Tenn. Code Ann. §40-30-112(b) (1990)(repealed) . . . . 48

**Supreme Court Rules**
Supreme Court Rule 14.1(a) . . . . . 44

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## STATEMENT OF THE CASE

Gary Bradford Cone was indicted for two counts of murder, three counts of assault with intent to commit murder, and one count of armed robbery after a crime spree culminating in the brutal beating death of an elderly couple. At trial, Mr. Cone was represented by attorney John Dice, who pleaded Mr. Cone not guilty by reason of insanity. The defense focused on Mr. Cone's Vietnam Veterans Syndrome and amphetamine psychosis as the cause for his legal insanity. At the close of the guilt phase of the trial, Mr. Cone was convicted on all counts.

A separate sentencing hearing followed, after which Mr. Cone was sentenced to death. The dispute before this Court concerns Mr. Cone's legal representation during that sentencing proceeding.

### *SENTENCING PROCEEDING*

After the jury returned with a verdict of guilty as charged on all indictments, the prosecutor informed the jury in his opening statement that he intended to prove four aggravating circumstances in support of a death verdict. *See* Tenn. Code Ann. §§39-2404(i)(2),(3),(5),(6) (1977). (J.A. 22-23, 54-55)[1]

Mr. Dice then gave a brief opening statement in the penalty phase where he recalled to the jury the testimony in the guilt/innocence phase of Drs. Jaremko and Lipman about Vietnam Veterans Syndrome and

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[1] Citations to the joint appendix are referenced by the abbreviation "J.A." followed by the pertinent page number. Citations to the appendix to the petition for writ of certiorari are referenced by the abbreviation "Pet. App." followed by the page cited.

amphetamine psychosis. (J.A. 23-27)[2] Dice did not explain to the jury in his opening what is mitigating evidence. He failed to inform the jury why the mental health evidence they had just found insufficient to support a defense of amphetamine psychosis was nonetheless sufficient to count as mitigation and justify a life sentence. (J.A. 23-27) Dice did not insure that the jury understood its sentencing decision was not a mere quantitative counting of aggravating and mitigating circumstances, but a reasoned moral decision. (J.A. 23-27)

The state then called five penalty phase witnesses in an attempt to prove the aggravating circumstances. The state's first witness, the criminal court clerk, introduced records of Mr. Cone's previous Oklahoma robbery convictions. On cross examination of the clerk, Dice elicited that the conviction records introduced contain a classification summary which refers to Gary Cone receiving a bronze star. (J.A. 31) The Bronze Star is a U.S. Military

[2] Dr. Matthew Jaremko, a clinical psychologist on staff with the Memphis Veteran's Center, testified that Gary Cone suffers from a substance abuse disorder superimposed upon post traumatic stress disorder stemming from his involvement in the Vietnam War (J.A. 12). Gary Cone never used drugs prior to his service in Vietnam, but began using drugs as a way to self medicate against the trauma of combat. (J.A. 13-14) Dr. Jaremko testified that Mr. Cone's condition constituted a mental disease or defect that would render him incapable of conforming his conduct to the requirements of the law. (J.A. 14)

Dr. Jonathan Lipman, a neuropharmacologist, testified that Gary Cone was a poly drug user with amphetamines (stimulants) and cocaine being his drugs of choice. (J.A. 17) Mr. Cone's drug history began in Vietnam where on one occasion he used amphetamines for 53 straight days while on guard duty. (J.A. 18) Mr. Cone's drug use over time substantially increased, creating a condition known as amphetamine psychosis which produces a psychotic effect and prevented Mr. Cone from conforming his conduct to the requirements of the law. (J.A. 19)



decoration awarded for heroism or achievement in military operations other than those involving aerial flights, but this was never explained to the jury.[3] Dice did not cross examine any of the other penalty phase witnesses and called no mitigation witnesses. (J.A. 35, 38, 40, 50)

After the prosecutor delivered a closing argument telling the jury that under the law Gary Cone should be sentenced to death, John Dice waived closing argument. (J.A. 52) Thus, Dice did not present any evidence or argument in response to the prosecution's penalty phase case for death. The trial judge instructed the jury that upon the finding of at least one statutory aggravating circumstance, if "said circumstance or circumstances are not outweighed by mitigating circumstances, the sentence shall be death." (J.A. 57) The jury then returned a verdict of death, finding the four aggravating circumstances argued by the prosecution. (R4, Add. 1, Doc. 1, Tr. Vol. 20, pp. 2151-2154)[4]

On appeal, the Tennessee Supreme Court affirmed the conviction and death sentence. *State v. Cone*, 665 S.W. 2d 87 (Tenn. 1984). (Pet. App. 84) The Tennessee Supreme Court held one of the aggravating circumstances found by the jury to be inapplicable[5], but ruled the error to be harmless. (Pet. App. 96)

[3] *Webster's New Universal Unabridged Dictionary* (Random House, 2d ed. 1996) p.266

[4] The entire state court record of all proceedings in Mr. Cone's case was filed with the District Court, and assigned a single docket entry number, R4. The record is subdivided into addenda, and documents, which are even further subdivided and paginated.

[5] "The defendant knowingly created a great risk of death to two or more persons, other than the victim murdered, during his act of murder." Tenn. Code Ann. §§39-2404(i)(3) (1977).

## *STATE POST CONVICTION PROCEEDINGS*

A state post conviction hearing was conducted on April 28th and 29th, 1986 in the Criminal Court of Shelby County, Tennessee. The issues raised on post conviction included whether:

- Trial counsel was ineffective for failing to offer proof of mitigating circumstances during the penalty phase of the trial.
- Trial counsel was ineffective for failing to make a closing argument during the penalty phase of the trial.

(Amended Post Conviction Petition ¶11a, R.4, Add. 2, Doc. 1, p. 51)

Dice testified in the post conviction hearing that he was retained to represent Mr. Cone. (R4, Add. 2, Doc. 1, Tr. p. 91) Dice recalled that he put on some proof as to Cone's Vietnam background through Gary's mother, Valerie Cone. (J.A. 63-64)[6] He acknowledged that his ability to introduce proof about Gary Cone's Vietnam service through Valerie Cone during the guilt/innocence phase of the trial was limited, due to the state's objection that the proof was not relevant to the insanity defense. (J.A. 63-64) Dice stated he knew the references to the Bronze Star were in the Oklahoma prison records, and he elicited the reference to the Bronze Star on cross

[6] Valerie Cone testified in the guilt/innocence phase that Gary graduated from high school and went into the army. (R4, Add. 1, Doc. 1, Tr. Vol. 15, pp. 1633-1634) After her son came back from the Vietnam War he was different. Gary Cone suffered from nightmares and did not sleep well. (J.A. 10) He hollered about body bags and how terrible it was to handle dead bodies being brought back from Vietnam. (J.A. 10) Prior to fighting in the Vietnam war Gary had not been a drug user or alcoholic. (R4, Add. 1, Doc. 1, Tr. Vol. 15, p. 1647)



examination of the clerk. (J.A. 64-65) Dice allegedly tried to get Gary Cone to testify, but Cone purportedly did not want to take the stand because Cone thought he might lose his temper in front of the jury. (J.A. 66) Dice also testified he was concerned about calling witnesses in mitigation to testify to Gary Cone's background, since he erroneously believed such witnesses could be used by the state in cross examination to develop other prior bad acts:

> Q. Why would it have been stupid to put on a high school principle [sic] in this case?
>
> A. ...Picture this scenario. You've got them on the stand; once you've put on this trial for life, as we call it, you and I, and the burden is what now? It's only preponderance of the evidence. Comes now the skilled prosecutor, Mr. Strother, over there, and says, oh, he was a good student in high school; right? And Vietnam affected his mind; right? What about all the robberies he pulled? They have him in prison in Oklahoma. I mean, he was in prison once. Did you know about those things? And how about this and that, you know and other things Mr. Cone told me about.
>
> So, in other words, many times I've seen people on these stands who were brought down as character witnesses and things like that, and I've heard people like Mr. Strother, as he is skilled in doing, get up and feeding that stuff and they hurt you more than they help you.

(R. 4, Add. 2, Doc. 1, Tr. pp. 104-105; *see also* Tr. pp. 137-138)

Since 1979, Tennessee law has clearly held that presenting mitigation evidence in the penalty phase of a capital trial as to a defendant's background does not open the door to testimony about present criminal proclivities. *Cozzolino v. State*, 584 S.W.2d 765, 768 (Tenn. 1979). Dice thus did not know the law concerning mitigation evidence since he thought mitigation testimony about Gary Cone's high school background, or how Vietnam affected his mind would "open the door" to testimony about unrelated later criminal acts.

In light of the hopelessness he felt concerning this case, part of Dice's strategy was to have the jury find an improper aggravating circumstance that he knew was not supported by the evidence, then have the case remanded for a new sentencing hearing at a later date:

> Now, so my tactics, and I told Mrs. Cone this the first day I met her, that if ...[the prosecutor] does not elect to offer life in this case, your boy is going to the chair and there's not going to be a darn thing, except I didn't use that word, I'm going to be able to do to stop it except to maybe screw up the prosecution, and in my viewpoint... if I could get him to screw up the aggravated [sic] circumstances in this case and set it back, the trial, then I thought we would have a good chance later on, because of the way capital cases are conducted, and sure enough, Mr. Strother got them going, got the jury going, and he convinced the jury in argument, he and Mr. Patterson, that, guess what, Mr. Cone endangered the life of two or more other people other than the victims at the time of the crime.
>
> The case law in Tennessee up to that point had consistently held that if a jury made an illegal



> finding of an aggravated [sic] circumstance, that ended the death penalty phase. And once I saw that, and this is the reason I waived my final argument in this case, for two reasons; Mr. Strother is also brilliant, as is Mr. Patterson, and if I'd let Strother get back up there, he might have figured out that, wait a moment, we've screwed this case up and it stands to be reversed. That strategy worked perfectly, ..., because the Supreme Court found out that they had made an illegal finding in their verdict, and unfortunately, the Supreme Court said, well, we know that's been the law before, Mr. Dice, but three of four ain't bad and he gets the chair.

(R4, Add. 2, Doc. 1, Tr. pp. 107-109)

Dice thus waived closing argument to prevent Mr. Strother from making a final rebuttal argument, and to allow the prosecution free reign to argue an aggravating circumstance not supported by the evidence. As a matter of "strategy" Dice anticipated his silence would allow the jury erroneously to find an aggravating circumstance, so his client would be sentenced to death in hopes of having the case remanded later for another sentencing hearing.[7]

John Dice committed suicide less than six months after the hearing. (J.A. 88) Dice's medical records (obtained in federal habeas corpus proceedings) indicate that at the time Dice testified in post conviction proceedings he suffered from "confused thinking, impaired memory, inability to concentrate for more than a short

[7] The Tennessee courts never announced a *per se* rule that the finding by a jury of an improper aggravating circumstance automatically mandates a new sentencing hearing. Dice's testimony to this effect is also erroneous.

period of time, paranoia, grandiosity, and inappropriate behavior." (J.A. 88-89)[8] As of February 7, 1986, two months prior to the post conviction hearing, Dice was deemed incompetent to continue practicing law by his psychologist. (J.A. 88)

Gary Cone testified in post conviction that Dice never discussed with him the strategy or proof that would be presented in the penalty phase of the trial. (R4, Add. 2, Doc. 1, Tr. p. 203) Gary Cone was not consulted with respect to Dice's decision not to present any mitigating evidence in the penalty phase, or with respect to Dice's decision to waive final argument. (R4, Add. 2, Doc. 1, Tr. pp. 204-205)

The post conviction court entered its findings of fact on September 19, 1986. (J.A. 78) The post conviction court found that Dice's strategy "was to get in as much mitigation during the guilt/innocence phase as he could." (J.A. 84) The court then found that Dice's decision to forego any evidence in mitigation did not fall below the objective standard of reasonableness set by the Sixth Amendment's guarantee of the effective assistance of counsel. (J.A. 84) With respect to the waiver of closing argument, the court found it was Dice's strategy to waive argument to prevent the prosecutor from making a "devastating" closing argument. (J.A. 84), The court found this to be a sound trial strategy.

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[8] Reading Dice's post conviction testimony corroborates the medical records findings of grandiosity. For example, Dice testified that he, along with a lawyer in New York first developed Vietnam Veteran's Syndrome as a defense across the country. (R4, Add. 2, Doc. 1, Tr. p. 92) Dice opined that one of his experts, Dr. Lipman, was "probably the leading research scientist in the world" in amphetamine psychosis. *Id.* Dice testified he filed hundreds of pre-trial motions in Gary Cone's case. (R4, Add. 2, Doc. 1, Tr. p. 165) The whole tone of Dice's testimony is melodramatic and grandiose.



On appeal, post conviction counsel urged the court to apply *U.S. v. Cronic*, 466 U.S. 648 (1984), and presume prejudice because in Cone's case there was a fundamental breakdown of the adversarial process:

> Because the duty to argue for a capital defendant's life is so fundamental, the failure to argue constitutes a fundamental breakdown of the adversarial testing process and hence no specific showing of prejudice is necessary. *See United States v. Cronic*, *supra* at 2047, n. 25
>
> (Post Conviction Appellate Brief, R 4, Add. 2, Doc. 2, p. 30; *see also* pp. 21-23)

The Tennessee Court of Criminal Appeals affirmed the post conviction court's findings that John Dice was effective. (Pet. App. 101) The Court of Criminal Appeals did not discuss the applicability of *Cronic*, even though it was argued by post conviction counsel as the applicable rule. In all other respects the Court of Criminal Appeals affirmed the post conviction trial court.[9]

### *HABEAS CORPUS PROCEEDINGS*

Gary Cone then sought habeas corpus relief in the United States District Court for the Western District of Tennessee. The District Court did not apply *U.S. v. Cronic* to analyze Gary Cone's Sixth Amendment claims.

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[9] Gary Cone later filed a second state post conviction petition. All of the claims raised in this second petition were held procedurally barred by the state court on grounds that such claims were either waived or previously determined. *See Cone v. State*, 927 S.W. 2d 579 (Tenn. Crim. App. 1995).

Rather, the court erroneously applied *Lockhart v. Fretwell*, 506 U.S. 364, 368 (1993).[10] Using this erroneous standard, the District Court held that Gary Cone "failed to carry his burden to demonstrate that the verdict was fundamentally unfair or unreliable" (Pet. App. 80) as required by *Fretwell*, and therefore he was not entitled to relief. The District Court also held that the Tennessee courts' rejection of Cone's Sixth Amendment claims did not "involve any unreasonable application of clearly established federal law" and thus dismissed his Sixth Amendment claims. (Pet. App. 80) Gary Cone's other claims were either held procedurally defaulted, or held to be barred by 28 U.S.C. §2254(d). The District Court denied habeas corpus relief.

On appeal the United States Court of Appeals for the Sixth Circuit found John Dice totally abdicated his role as an advocate in the penalty phase of the trial. The Court called Dice's purported strategy of failing to present a case for life "confusing" and "convoluted." (Pet. App. 34) The Sixth Circuit explained that during the penalty phase of a capital trial, the only conceivable goal is to persuade the jurors not to sentence Cone to death. (Pet. App. 35) The Court noted that the reason found by the trial court for Dice waiving closing argument was to prevent the prosecution making a rebuttal argument. Yet, the effect upon the jury of waiving argument was, by silence, an acquiescence to the prosecutor's plea that Cone must be sentenced to death:

> Cone may well have fared better if his counsel had left the courtroom entirely for the sentencing phase of the trial. If that had occurred, the jurors could not have inferred, as indeed they must

[10]This precisely was the analysis found erroneous by this Court in *Williams v. Taylor*, 529 U.S. 362 (2000).



> have, that counsel's knowing and purposeful silence was an implicit agreement that justice required that Cone be put to death.

(Pet. App. 36)

The Sixth Circuit found in essence Cone did not have counsel during the sentencing phase of his trial, and under *U.S. v. Cronic*, prejudice should be presumed. (Pet. App. 37) Because the Sixth Circuit granted sentencing relief, Mr. Cone's other claims challenging his sentence of death were pretermitted. (Pet. App. 28)[11]

On petition for writ of certiorari, the petitioner framed the following two issues for review by this Court:

I. By applying a *de novo* standard of review to a habeas petitioner's ineffective assistance of counsel claim, does the court of appeals' ruling conflict with *Williams v. Taylor*, 529 U.S. 362 (2000), which set the standard of review under 28 U.S.C. §2254(d)(1) for granting habeas corpus relief to state prisoners on claims that have been previously adjudicated on the merits in state court?

II. May a federal court of appeals bypass the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984), and presume prejudice under *United States v. Cronic*, 466 U.S.648, (1984), to find a violation of the Sixth Amendment right to counsel, where defense counsel conducts a thorough

[11]Petitioner's brief incorrectly states that the Sixth Circuit applied a *de novo* standard of review to the state court findings and conclusions of law. (Petitioner's Brief, p. 33) It is clear in the Sixth Circuit opinion that the Sixth Circuit is reviewing the District Court's conclusions *de novo*, not the state courts' conclusions. (Pet. App. 6)

pretrial investigation, presents lay and expert witness testimony in support of a mental health defense at trial, conducts direct and cross examination, and addresses the jury at both the guilt and sentencing phase on behalf of his client, and where the state and district courts have previously determined that the defendant demonstrated no actual prejudice from any deficiencies identified in the attorney's performance?

(Petition for Certiorari, p. i).

Neither question presented by petitioner seeks review of the Sixth Circuit's holding that John Dice's representation of Gary Cone at the sentencing phase was deficient. Rather, the primary question raised before this Court is — given the extent of the deficient performance found by the Sixth Circuit, namely a total abdication of advocacy — should the Sixth Circuit have applied *Cronic* and presumed prejudice? The corollary issue presented asks whether, by failing to apply *U.S. v. Cronic*, did the state courts render a decision that was contrary to or an unreasonable application of clearly established federal law?

## *SUMMARY OF THE ARGUMENT*

1. The Sixth Amendment to the United States Constitution guarantees an accused the right to the assistance of counsel for his defense in a criminal trial. In safeguarding this right, this Court has established different rules, applicable to different factual situations, to determine whether an accused's Sixth Amendment rights have been violated to the degree that mandates a new trial.



If an accused facing risk of imprisonment is not afforded counsel altogether, the Sixth Amendment is violated, and a defendant is awarded a new trial with the benefit of counsel. The rationale for automatic new trials in these cases stems from the advocate's role of ensuring an accused is afforded all the other constitutional safeguards surrounding a criminal trial. Without counsel, the prosecution's case is not subjected to meaningful adversarial testing, defense proof is not marshaled to counter the force of the state's case, and the finder of fact does not benefit from a balanced view of the evidence. In these cases, a trial with no counsel produces a result with no indicia of reliability, and the validity of the judgment is uncertain. In such cases it is not worth the cost of a case by case analysis to discern whether, notwithstanding the absence of counsel, the defendant nonetheless received a fair trial. Rather, it is presumed he did not. Simply put, for an adversarial proceeding to be fair, there must be two adversaries at work presenting and testing evidence.

Contrast the complete denial of counsel with cases where an attorney is present acting as an advocate for the accused, but the attorney makes specific errors during the trial, such as failing to make a specific objection. In these cases, this Court has required the defendant raising the Sixth Amendment claim to demonstrate that the error complained of somehow affected the outcome of the trial. *Strickland v. Washington*, 466 U.S. 668 (1984). An automatic new trial is not required because of a specific attorney mistake, since the accused has an advocate trained in the law that, though perhaps not perfect, nonetheless is generally subjecting the prosecution's case to adversarial testing, and presenting the accused's case to the finder of fact in its best light. In these cases, the court assumes a reliable verdict, unless the accused

can show that somehow the error complained of likely affected the outcome of the trial. Thus, if an attorney failed to object to an unconstitutionally vague aggravating circumstance in a capital sentencing proceeding, and the jury did not find such aggravating circumstance to be supported by the evidence, the attorney error could not be shown to have affected the outcome of the trial. In these cases, it is far easier for a reviewing court to conduct a case by case analysis to determine if specific errors "prejudiced" the defendant.

There are circumstances, however, when though an attorney is present at the criminal trial, such attorney totally fails to act as an advocate. In *United States v. Cronic*, 466 U.S. 648 (1984), this Court explained that an attorney's total failure to subject the prosecution's case to meaningful adversarial testing during a critical phase of a criminal trial should result in a presumption of prejudice. The same concerns as to the reliability of a verdict untested by an adversary, which result in the presumption of prejudice with the complete denial of counsel, are also present with a "constructive" denial of counsel. The lower courts have sparingly applied *Cronic* in situations such as a lawyer who sleeps through substantial portions of a capital trial; or when a lawyer berates his client in front of the jury, calling him derogatory names, making it as if his attorney is a second prosecutor.

In this case, Gary Cone's attorney failed to present a case for life in the sentencing phase of his capital trial. After the prosecution put forth evidence of aggravating circumstances, Cone's attorney failed to respond with any mitigation proof of his own. After the prosecution told the jury that Tennessee law obliged the jury to vote for death, the attorney replied by waiving closing argument. The effect before the jury was devastating. The jury was left with the impression that Gary Cone's



lawyer agreed that death was the required sentence, since he failed to counter the state's penalty phase case, and failed to disagree with the prosecutor's call for death. His silence implied his consent. The attorney's failure to make a case for life amounted to a total failure to subject the prosecution's case for death to meaningful adversarial testing. It would have been better had Gary Cone's lawyer not shown up for the penalty phase. At least then the jury would not have had the impression that Cone's own lawyer had given up, viewing death as the inevitable sentence. The Sixth Circuit properly applied *Cronic* in this case, and presumed prejudice due to the attorney's total abdication of advocacy in the penalty phase of Gary Cone's trial.

2. Federal law provides that relief may not be granted to a federal habeas petitioner challenging a state criminal conviction unless the state court decision was contrary to, or involved an unreasonable application of, clearly established law as determined by the Supreme Court of the United States. 28 U.S.C. §2254(d)(1). If this Court finds that the Sixth Circuit was correct in presuming prejudice in this case following *U.S. v. Cronic*; then it also follows that the state court decision refusing to apply *Cronic* is contrary to clearly established federal law.

This case thus closely parallels *Williams v. Taylor*, 529 U.S. 362, 405, 413 (2000)(O'Connor concurring), where this Court found the Virginia Supreme Court to have applied the wrong rule of law in analyzing an ineffective assistance of counsel claim in a capital sentencing proceeding. In *Williams*, this Court held that the Virginia Supreme Court's application of *Lockhart v. Fretwell*, 506 U.S. 364 (1993), to be contrary to clearly established federal law since *Strickland* was the correct rule the court should have applied. In the same way, if the Sixth Circuit is correct and *Cronic* provides the rule that governs this

case, then the state court decision applying *Strickland* rather than *Cronic* is contrary to clearly established federal law, and 28 U.S.C. §2254(d)(1) does not bar habeas relief.

## ARGUMENT

### I. THE A.E.D.P.A. DOES NOT BAR HABEAS RELIEF IN THIS CASE, SINCE THE STATE COURTS' CHOICE OF THE WRONG SIXTH AMENDMENT RULE IS CONTRARY TO CLEARLY ESTABLISHED FEDERAL LAW.

Certain provisions of the Anti-Terrorism and Effective Death Penalty Act, now codified at 28 U.S.C. §2254(d), limit instances when a state prisoner may obtain federal habeas relief. With respect to any claim adjudicated on the merits in state court, relief may not be granted unless the state court decision was not only wrong on the merits of the constitutional claim, but was also contrary to, or involved an unreasonable application of clearly established law as determined by the Supreme Court of the United States. 28 U.S.C. §2254(d)(1).

Here the question before the Court is whether the Sixth Circuit properly applied *U.S. v. Cronic*, 466 U.S. 648 (1984), to presume prejudice in Mr. Cone's capital sentencing hearing. (*See* Question Presented II) If the Sixth Circuit is correct and *Cronic* controls, then the state court decision refusing to apply *Cronic* would be contrary to clearly established law. In *Williams v. Taylor*, 529 U.S. 362, 405 (2000), Justice O'Connor delivered the Court opinion with respect to the proper construction of 28 U.S.C. §2254(d). Construing the "contrary to" clause, the Court recognized that a "state court decision will certainly be contrary to our clearly established precedent if



the state court applies a rule that contradicts the governing law set forth in our cases." *Id.* at 405. In analyzing the facts in *Williams*, Justice O'Connor noted that the clearly established law to be applied for a garden variety ineffective assistance of counsel claim alleging specific attorney error is the two prong test announced in *Strickland* discussed *infra*. The Virginia Supreme Court held in Williams' case that a later Supreme Court decision, *Lockhart v. Fretwell*, 506 U.S. 364 (1993), governed, requiring the defendant to demonstrate the criminal proceeding was fundamentally unfair or unreliable. *Williams*, 529 U.S. at 413-414. (O'Connor concurring) Justice O'Connor explained that the Virginia Supreme Court's decision in *Williams* was "contrary to" clearly established federal law because the Virginia court employed the rule of *Lockhart v. Fretwell*, instead of the rule of *Strickland v. Washington*, to adjudicate a case that should have been adjudicated under *Strickland's* rule. *Williams*, 529 U.S. at 413-414.

In the present case, the Sixth Circuit held that because there had been a complete breakdown of the adversarial process in the sentencing phase of Cone's trial, the governing rule for Cone's Sixth Amendment claim was that of *U.S. v. Cronic*. If that substantive ruling was correct, then the Tennessee Court of Criminal Appeals erroneously chose to apply the *Strickland* rule to a *Cronic* case, in the same way that in *Williams*, the Virginia Supreme Court erroneously chose the *Fretwell* rule to apply to a *Strickland* case. In both situations, the answer to the question "whether the state court correctly identified the governing legal rule" (Petitioner's Brief p. 21) is negative.

Petitioner's substantive quarrel with the Sixth Circuit decision (in Question Presented II of the petition for writ of certiorari) is precisely that the Sixth Circuit found the case

at bar governed by the *Cronic* rule rather than the *Strickland* prejudice rule. If this Court resolves the *Cronic* issue in Mr. Cone's favor, as counsel urges it should, then *Williams* dictates the Sixth Circuit's unremarkable conclusion that the Tennessee Court of Criminal Appeals application of *Strickland* prejudice standards to an issue governed by *Cronic* standards was "contrary to" *Cronic* within §2254(d) as construed by *Williams*.

## II. THE UNITED STATES COURT OF APPEALS CORRECTLY PRESUMED PREJUDICE UNDER *US. v. CRONIC* IN ANALYZING GARY CONE'S SIXTH AMENDMENT CLAIM

### A. The Sixth Amendment guarantees a criminal defendant the right to the effective assistance of counsel.

The Sixth Amendment to the United States Constitution assures that no person shall be subjected to criminal prosecution without the assistance of counsel:

> In all criminal prosecutions, the accused shall enjoy the right...to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.
>
> U.S. Const. Amend. VI

In our system of justice, lawyers are necessities, not luxuries, critical to insuring a fair trial. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). The accused in a



criminal case:

> ...requires the guiding hand of counsel *at every step of the proceedings* against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.
>
> *Powell v. Alabama*, 287 U.S. 45, 69 (1932) (emphasis supplied).

The right to counsel has "long been recognized as the right to effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970). The very purpose of the Sixth Amendment right is to ensure "assistance" for the accused when confronted with the "intricacies of the law and the advocacy of the public prosecutor." *United States v. Ash*, 413 U.S. 300, 309 (1973). To hold otherwise "could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel." *Avery v. Alabama*, 308 U.S. 444, 446 (1940).

### B. This Court has established different rules for analyzing Sixth Amendment claims, depending upon whether counsel is completely denied, constructively denied, or counsel commits specific errors in representation.

This Court has employed different tests to determine whether the right to counsel is violated in a criminal case; some of which require a defendant to demonstrate prejudice arising from the violation in order to obtain relief, others not. The court has "uniformly found con-

stitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *U.S. v. Cronic*, 466 U.S. at 659 n. 25 (1984). On the other hand, in cases where an actively participating attorney commits specific errors, the Court "require[s] the defendant to demonstrate that the errors actually had an adverse effect on the defense." *Roe v. Flores-Ortega*, 528 U.S. 470, 482 (2000). Where specific failures of performance are the focus of a Sixth Amendment claim, *Strickland v. Washington*, 466 U.S. 668, 687 (1984), establishes a rule requiring a defendant to prove both (1) deficient performance and (2) prejudice from the deficient performance to establish a Sixth Amendment claim.

There is another category of cases, where, although a person who happens to be a lawyer is present at trial (or is supposed to be) with the accused, the putative lawyer engages in absolutely no advocacy on behalf of the accused. In these cases, prejudice is presumed as in the cases involving complete denial of counsel. This Court established the rule for evaluating *constructive* denial of counsel in *United States v. Cronic*:

> The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary system itself presumptively unreliable.

*Cronic*, 466 U.S. at 659



This presumption follows from the fact that lawyers in criminal cases are necessities, they are the means through which the other rights of the person on trial are secured. *Id.* at 653. The very premise of our adversary system is that partisan activity on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. *Herring v. New York*, 422 U.S. 853, 862 (1975); *Cronic*, 466 U.S. at 655. The adversarial process thus requires a defendant to have counsel acting in the role of an advocate. *Anders v. California*, 386 U.S. 738, 743 (1967); *Cronic*, 466 U.S. at 656. Because counsel's *assistance* is essential, a trial is unfair if the accused is constructively denied counsel at a critical stage. *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000).

Thus the rule of *Cronic* can be succinctly stated as follows: when counsel entirely fails to subject the prosecution's case to meaningful adversarial testing at a critical stage of a criminal trial, the Sixth Amendment is violated, and prejudice is presumed.

Petitioner takes issue with *Cronic* and baldly assets in his brief that prejudice may only be presumed when (1) there is a complete denial of counsel; (2) the government interferes with the right to counsel; or (3) counsel labors under an actual conflict of interest. (Petitioner's Brief p. 36). Petitioner posits that "Bad lawyering, no matter how bad, does not justify invoking a *per se* presumption under *Cronic*." (Petitioner's Brief p. 37) Petitioner urges this Court to apply the *Strickland* attorney error test in all Sixth Amendment cases where an attorney is present with the defendant.

Yet *Strickland* itself acknowledges that prejudice should be presumed if counsel is constructively denied; and cites *Cronic* as authority for that proposition:

> In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. *See United States v. Cronic*, 466 U.S. at 659, and n. 25.
>
> *Strickland*, 466 U.S. at 692

Petitioner wholly ignores *Cronic's* language that "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Cronic* 466 U.S. at 659. This language plainly contemplates presuming prejudice in cases where an attorney is present on the defendant's behalf at the trial, but engages in no advocacy.

Petitioner's proposed rule also proves too much. He suggests that there is nothing so outrageous, so deplorable, so contrary to a client's interest that an attorney can do or fail to do that would warrant a presumption of prejudice. Under petitioner's rule, if an attorney stood up in closing argument at the penalty phase of a capital trial and told the jury that they should vote to execute a client because he's a despicable monster that deserves to die, prejudice would not be presumed.[12] The state courts in such a case under petitioner's rule would be free to find that the prosecution's penalty phase case was so overwhelming, it wouldn't have made a difference if the lawyer actually advocated

[12] Such a hypothetical is not that far-fetched. *See, eg. Rickman v. Bell*, 131 F.3d 1150 (6th Cir. 1997) (Counsel ineffective and prejudice presumed under *Cronic* in death penalty proceedings where lawyer calls his client abnormal, crazed and dangerous psychiatric case who acted like a bull).



for the defendant. Likewise, if counsel comes to trial intoxicated, or sleeps through the proceedings,[13] under petitioner's proposed rule, there would be no constitutional foul unless the defendant could show counsel's being awake and sober would have made a difference.

Given that prejudice is presumed when the accused is afforded no lawyer, *Cronic* simply requires prejudice also to be presumed in that rare case where the accused's lawyer is so bad that it is fundamentally equivalent to having no lawyer. The policy justifications for presuming prejudice when no lawyer is afforded a defendant, are equally present if a person who happens to be a lawyer is appointed, but does nothing that could be construed as advocacy. In either case, the verdict is unreliable, because the evidence presented by the prosecution has not been tested by cross examination, countervailing proof, and countervailing argument. Thus the verdict bears no indicia of reliability. Cases involving constructive denial of counsel are altogether different than cases where an attorney is acting as an advocate, but makes some specific error. In the latter instances, counsel's overall advocacy provides some assurance that the verdict is reliable, and in such cases it makes sense to examine whether a specific failure of counsel likely affected the outcome of the trial. Yet where no advocacy occurs, it is just as if there is no counsel at all. In an adversarial system, there must be two adversaries testing the case in order to be sure of the reliability of the verdict. If there is no adversary arguing one side of a case, the Court assumes the absence of an adversary taints the fairness and reliability of the proceeding.

In *Powell v. Alabama*, this Court reversed the convic-

[13] *See, eg. Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001) (cert. pending) (lawyer slept through substantial portions of capital murder trial).

tion of six African Americans accused of raping two white girls (a capital offense) near Scottsboro, Alabama. *Powell v. Alabama*, 287 U.S. 45 (1932). The trial judge had appointed all members of the bar to arraign the defendants. Whether the whole bar would continue to represent the defendants was not clear. *Id.* at 56. On the day of the trial, a lawyer from Tennessee appeared on behalf of persons interested in the defendants, but stated he had not sufficient time to prepare the case or to familiarize himself with local procedure. *Id.* at 57. The Alabama trial court resolved the problem by appointing the Tennessee lawyer to be assisted by whatever help the local bar could provide. *Id.* at 57-58. In *Powell*, this Court noted that:

> [D]uring perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself.
>
> *Powell*, 287 U.S. at 57.

In *Powell*, the Court granted *Sixth Amendment* relief when several counsel were in fact appointed, and no showing of prejudice was demonstrated. All the state's witnesses were subjected to rigorous cross examination by trial counsel. *Powell*, 287 U.S. at 75 (Butler dissenting). The collective defense attorneys prepared and submitted motions for change of venue, and called witnesses to support the motion. *Id.* The dissent also notes that there was ample evidence to support a conviction since while each defendant asserted his own innocence, each



testified he saw the others accused commit the crime charged. *Id.* at 75-76.

*Powell* is instructive since a Sixth Amendment violation occurred notwithstanding the physical presence of counsel. *Powell* refutes Petitioner's claim that bad lawyering, no matter how bad, never results in a presumption of prejudice.

### C. When a lawyer abandons his duty to present a case for life in the penalty phase of a capital trial, the rule of *Cronic* applies.

The United States Court of Appeals for the Sixth Circuit applied the rule of *Cronic* in Gary Cone's Case due to counsel's total failure to mount a defense to the prosecution's penalty phase case for death:

> Essentially, Cone did not have counsel during the sentencing phase of his trial and thus the prosecutor's insistence that justice required that Cone be put to death was not subjected to "meaningful adversarial testing." *Cronic*, 466 U.S. at 656. We find that counsel's abandonment of Cone at possibly the most "critical stage of his trial" fell below an objective standard of reasonableness and prejudiced him, which resulted in the ineffective assistance of counsel under the Sixth Amendment.
>
> (Pet. App. 37)

When a lawyer representing a capital defendant sits idly by as the state presents aggravating proof supporting a death sentence, fails to present mitigation proof, then waives closing argument after the prosecution argues the (unrefuted) proof demands a death verdict, the attorney inescapably leaves the jury with the

impression that the prosecution's case is overwhelming, irrefutable, and the defendant deserves death. The penalty phase of a capital trial is the most critical stage of the proceeding. Counsel's failure to mount some case for life during the penalty phase, in response to the prosecution's proof and argument for death constitutes a total failure to subject the prosecution's case to meaningful adversarial testing, requiring application of the *Cronic* rule.

1. *In a capital sentencing proceeding, the lawyer must make a case for life.*

At the penalty phase of a capital trial, the sole issue to be resolved is whether the defendant should be sentenced to death or life imprisonment. The defense attorney must marshal all available evidence to counter the state's case for death, and affirmatively present the jury with reasons they should vote for the defendant's life to be spared. Admissible evidence encompasses any fact which a juror might find supports a sentence less than death, including facts pertinent to the defendant's background, upbringing, life experience, and mental illness which may not rise to the level of an insanity defense. *Lockett v. Ohio*, 438 U.S. 586, 605 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 113-115 (1982); *Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986). The scope of relevant proof is therefore much broader than that which is relevant to the issues at the guilt/innocence phase. The essence of defense counsel's role in a capital sentencing proceeding is to individualize and humanize the defendant - to help the sentencer grasp an intelligible picture of the defendant as a person who is more than just the perpetrator of a murder. The lawyer must advocate his client is a human being with a unique personal history of experiences, attributes, even frailties, that



add up to a life worth sparing in the exercise of reasoned moral judgment. *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989).

Since Tennessee is a "weighing state" the jury is instructed that if it finds the presence of at least one aggravating circumstance, it must weigh these circumstances against mitigation circumstances present to determine whether the defendant should be sentenced to death. (J.A. 57) "As an advocate for life, counsel must attempt to demonstrate that mitigating factors outweigh aggravating factors and must present the sentencer with the most persuasive possible case for mercy." Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299, 318 (1983). This is because "[a]fter considering all the gruesome evidence in the guilt/innocence phase, the jury probably will need no additional reasons to impose the death penalty.... Obviously, if the defendant has mitigating factors in his or her behalf, these must be advanced and sold to the jury." Tennessee Association of Criminal Defense Lawyers, *Tools for the Ultimate Trial*: The TACDL Death Penalty Defense Manual, 10-5 (1985).

Death is never a foregone conclusion in a capital case, no matter how ugly the murder. A prime example would be the Tennessee cases of *Groseclose v. Bell*, 130 F.3d 1161 (6th Cir. 1997), and *Rickman v. Bell*, 131 F.2d 1150 (6th Cir. 1997). William Groseclose hired Ronald Rickman to kill his wife. Rickman and an accomplice abducted Deborah Groseclose, raped, strangled and stabbed her. Then they stuffed her in the trunk of a car and left her to die in the Memphis summer heat. Counsel for both Groseclose and Rickman were deplorable. Ronald Rickman's attorney portrayed his client to the jury as an abnormal, crazed and dangerous

psychiatric case, and even referred to him as a bull. *Rickman*, 131 F.3d at 1158-1159. Groseclose's lawyer also failed to mount any defense, and abdicated his case to the lead of Rickman's counsel, who was hostile to his own client. *Groseclose*, 130 F.3d at 1169-1170. The jury sentenced them to death. Both defendants were afforded habeas relief in federal court. With new counsel, both Groseclose and Rickman received a life sentence, despite the heinous facts of the case. Death is thus never a certain outcome in a capital case, because juries are weighing more than the facts of the case - they are considering a multitude of facts, including the defendant's background, life experience, and circumstances to arrive at a reasoned moral decision about sentence.[14]

*2. Dice failed to present a case for Gary Cone's Life*

Structurally, Gary Cone's penalty phase trial proceeded as follows: The prosecution made a brief opening statement, followed by Dice's brief opening statement. (J.A. 20-27) The prosecution then put forth proof of aggravating circumstances, and the defense put forth no proof of mitigating circumstances. The prosecution then argued that the law and proof the jury heard required

14 Tennessee juries have often sentenced defendants to life after a capital sentencing proceeding, even though the cases involved horrible facts. *See, e.g. State v. Thompson*, 2001 W.L. 912715 (Tenn. Crim. App. 2001) (Two high ranking gang members while incarcerated ordered "hit" on correctional officer who was executed in front of his home: each sentenced to life without parole and life respectively); *Cox v. State*, 880 S.W. 2d 713 (Tenn. Crim. App. 1994) (two women and their mother were murdered by defendant's beating them with a skillet and stabbing them with a knife: defendant sentenced to life); *State v. Bibbs*, 806 S.W. 2d 786 (Tenn. Crim. App. 1991) (eleven year old girl who threatened to tell her mother about sexual advances by a hotel security guard was brutally beaten by the guard and then thrown off the hotel balcony to her death: defendant sentenced to life).



Gary Cone to be sentenced to death, (J.A. 50-52) and the defense waived closing argument. (J.A. 52)

Dice presented absolutely no defense before the jury to the prosecution's case for death. The prosecution's case for death was not countered with any mitigation proof for life. The prosecutor in making his closing argument asked the jury to impose death as punishment, arguing it was required by the aggravating circumstances in Cone's case. After the prosecutor made his closing argument seeking death, John Dice stood up before the jury and stated "Defense waives final argument, your Honor." (J.A. 52) This failure to answer and contest the prosecution's argument for death is bound to have been construed by the jury as signifying at least "I have no good reply for that," or "I am at a loss for any reason why a death sentence should not be imposed." The jury was implicitly told by Dice's silence that whatever Dice might have said prior to the state's proof at sentencing - now that he's heard it - it is irrefutable.

Dice's failure to present a case for life spelled doom for Gary Cone in light of Tennessee's jury instructions about weighing aggravating and mitigating circumstances:

> If you unanimously determine that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved by the State, beyond a reasonable doubt, and said circumstance or circumstances are not outweighed by any mitigating circumstances, the sentence shall be death.
>
> (J.A. 57)

By failing to present a case for life, the jury was left with the impression that even defense counsel believed they had no choice but to impose death since there was no countervailing case for life to weigh. The combined

effect of mustering no evidence and making no argument to counter the state's case for death signaled resignation to a foregone conclusion that no case for life could be made. To the jury uneducated in the law, the statement that "the defense waives final argument" necessarily implies that there must be nothing good in response for the lawyer to say. Dice's silence after the prosecution's case implied to the jury that Dice was in agreement with the prosecutor. In a weighing state, this failure amounted to a concession that there was no mitigation to present. Counsel thus entirely failed to subject the prosecution's penalty phase case to meaningful adversarial testing.

Though it was mentioned by Dice in his guilt/innocence phase opening statement, Dice never developed the effects on Cone of seeing his dead brother being retrieved from a lake at age 8. (J.A. 102) (R4, Add. 2, Doc. 1, Tr. p. 94) The effects of Gary Cone's fiancé being raped and murdered in 1972 were not developed before the jury. (J.A. 102) Most importantly, Dice never developed proof about Gary Cone's receiving a Bronze Star for his heroic service in the Vietnam War, or explained why Cone received a Bronze Star, or even what a Bronze Star is. This failure is inexplicable in light of Dice's admitted knowledge about the Bronze Star decoration and its significance. (R4, Add. 2, Doc. 1, Tr. p. 158) (Dice would have "given his right arm" for a Bronze Star decoration).

In *Herring v. New York*, this Court addressed the crucial importance of closing argument in a criminal case. *Herring*, 422 U.S. 853 (1975). In that case New York enacted legislation allowing a trial court to deny closing argument to a defendant in a non-jury criminal trial. *Id.*

In discussing the case, this Court noted that closing argument "serves to sharpen and clarify the issues for



resolution by the trier of fact in a criminal case." *Id.* at 862. The lawyer's ability to respond *after* evidence has been presented marks a critical facet of the closing argument:

> For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt.
>
> *Id.*

The Court emphasized that "no aspect of such advocacy could be more important than the opportunity finally to marshal evidence for each side before submission of the case to judgment." *Id.* The Court then held that the New York Statute violated the defendant's Sixth Amendment right to counsel. *Id.* at 865.

*Herring* highlights why Dice's failure to advocate for Gary Cone's life in closing is so devastating. Only after the prosecution's case for death is presented can it be rebutted. Only after all the proof of aggravation and mitigation (if it had been presented) are before the jury can the evidence be marshaled to demonstrate why, based upon the facts admitted in evidence, Gary Cone should be allowed to live. Closing argument is an essential tool for the trial lawyer. Abandoning this tool left the jury with no guidance as to why the law could allow Gary Cone to be given life.

The jury was not provided a coherent case demonstrating why reasoned moral judgment called for a

sentence of life and not death - leading to the inescapable conclusion that there was none. As the Sixth Circuit stated:

> We can only imagine the effect on the jurors when Cone's defense counsel refused even to ask them to spare his client's life. They could only have inferred that Cone's counsel was, by his silence, acquiescing to the prosecutor's plea that Cone be sentenced to death... Cone may well have fared better if his counsel had left the courtroom entirely for the sentencing phase of the trial. If that had occurred, the jurors could not have inferred, as indeed they must have, that counsel's knowing and purposeful silence was an implicit agreement that justice required that Cone be put to death. When a man faces the gallows and his attorney sitting next to him declines even to ask the jurors to spare his life in the name of simple mercy, the attorney ought to have a most compelling reason for failing to speak - one that would incline a reasonable observer to credit as a sentencing strategy that is legally and factually justified. The reasons Cone's counsel has given are totally unreasonable, given the stakes. This was not strategic representation; it was non-representation of the most deadly sort.
>
> (Pet. App. 36)

3. *Dice's post hoc justifications for his failure to present a case for life are convoluted and confusing.*

John Dice testified in post conviction that he presented his mental health mitigation evidence in the guilt/innocence phase of the trial. Yet Dice never explained to the jury why - factually, morally, and legally- the mental health evidence which the jury had just



found insufficient to support a defense of insanity should nonetheless justify a life sentence in the penalty phase. Also, it is well documented that evidence of mental illness is a potential "two edged sword."[15] Without proper guidance from counsel, many jurors regard mental illness as an aggravating circumstance rather than a mitigating one.[16] By adopting a strategy to put forth mental health mitigation proof solely in the guilt phase of the trial (J.A. 84), counsel was limiting the jury to considering proof that was only relevant to the guilt phase issues of insanity. Though proof with respect to Gary Cone's drug dependence and post traumatic stress disorder arising from Vietnam is potentially mitigating, it by no means encompasses all mitigating proof that could be pre-

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[15] *Penry v. Lynaugh*, 492 U.S. 302, 324 (1989) ("Penry's mental retardation and history of abuse is thus a two edged sword: it may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future").

[16] [A] jury, having sat through a trial and struggled in the guilt/innocence phase, often is left with the impression that there is nothing about serious mental illness, by itself, that should be considered at the penalty phase as determining that the defendant should not be executed. The language used in jury instructions at this phase of a capital trial further adds to juror confusion. Terms such as "aggravating factors" and "mitigating factors" remain unexplained and are unfamiliar to many jurors. Studies have been shown that many jurors erroneously believe that mental illness is a reason for imposing a death sentence–i.e., that "mitigating" actually means "aggravating." "This error can easily occur because it is never explicitly explained to the jury that serious mental illness, if found, should normally be weighed against death." Dorean Marguerite Koenig, *Mentally Ill Defendants: Systemic Bias in Capital Cases*, 28 Human Rights 10, 11 (Summer 2001).

sented in his case.[17] Dice knew the proof in the record was limited in scope, since the prosecution objected during the guilt/innocence phase to the relevancy of testimony about Gary Cone's military service. (J.A. 63-64) But Dice never followed through by developing this mitigating evidence in the penalty phase . *Id.*

Dice also testified that the reason he did not call any witnesses to establish mitigating proof in the penalty phase was his concern that he would be opening the door to emphasize other prior bad acts. (R4, Add. 2, Doc. 1, Tr. pp. 104-105, 137) This testimony demonstrates his lack of understanding of mitigating evidence. Under Tennessee law, witnesses who would testify as to Gary Cone's traumatic childhood and horrible Vietnam experience would not have "opened the door" to cross examination about other prior bad acts. In *Cozzolino v. State*, 584 S.W. 2d 765 (Tenn. 1979), the Tennessee Supreme Court opined that only evidence relevant to an aggravating circumstance or mitigating factor raised by defendant is admissible in the punishment phase of a capital trial. *Id* at 767-768. The court held in *Cozzolino*

[17] This proof was also tainted by prosecutorial misconduct at the guilt phase closing argument, wherein the prosecution improperly argued Gary Cone did not have a drug problem, but rather, was a drug dealer, based upon a substantial amount of money found in Gary Cone's automobile at the scene of the crime. The post conviction court found that the prosecution should not have so argued, since the prosecutor knew the money in the car was robbery proceeds, not drug sale proceeds (J.A. 81), but the court ruled the error harmless as a substantive claim for relief. However, this improper taint of the guilt phase proof of Cone's drug induced amphetamine psychosis made the failure to admit proof of drug addiction at sentencing all the more important. The jury was presented with improper argument in the guilt phase closing that Cone did not at all use drugs. Dice never even attempted to correct the jury's tainted impression, which made any guilt phase proof of little value as mitigation evidence.



that defendant's proof of his troubled childhood introduced in an attempt to show the origin of his criminal acts does not open the door to the state to introduce proof concerning present criminal proclivities. *Id.* Thus the law was clear at the time of Gary Cone's trial that introduction of mitigation evidence as to Cone's background would not have opened the door for cross examination as to Gary Cone's other previously unmentioned bad acts. Either Dice did not know the law, or he was striving in his testimony to find some justification for his failure to present mitigation evidence.

Dice also testified incredibly that his "strategy" was to remain silent while the prosecution argued for an aggravating circumstance which Dice knew was not supported by the evidence. Dice's plan was to get the jury to find an aggravating circumstance not supported by the evidence and have his case reversed by the appellate courts. (R4, Add. 2, Doc. 1, Tr. pp. 107-109)[18] Any lawyer who would knowingly fail to refute an aggravating circumstance which is not supported by the evidence, in hopes of a future reversal is acting objectively unreasonably. In essence, Dice sought to concede a death verdict in hopes of a reversal on appeal. Such a strategy amounts simply to a total abdication of advocacy.

4. *Petitioner's arguments that Dice engaged in advocacy during the penalty phase have no merit in light of Dice's failure to make a case for life before the jury.*

Petitioner's brief raises four points in arguing that Dice engaged in some advocacy during the penalty

[18] It should be noted that Dice even did a poor job of implementing this bizarre strategy, since he did not object to the jury instructions for the objectionable aggravating circumstance.

phase of the trial. Petitioner points out that:

- Mitigation evidence of drug addiction and Vietnam Veterans Syndrome was developed in the guilt phase.
- Dice made an opening argument in the penalty phase asking for mercy, and asking the jury to recall the guilt phase testimony of Gary Cone's mental health problems.
- Dice solicited on cross examination of a penalty phase witness that court records refer to Gary Cone having been awarded the Bronze Star for his military service in Vietnam.
- Dice successfully objected and excluded from evidence two gruesome photographs of the deceased victims.

Petitioner argues that the above four points refute Cone's contention that Cone's case was not subjected to meaningful adversarial testing at the penalty phase. Yet the above points are irrelevant to Cone's argument that Dice failed to make a case for life. Putting oneself in the position of Gary Cone's jury, the jury was told it must decide whether Cone should live or die by weighing aggravating and mitigating proof. After the prosecution put forward aggravating proof, the defense rested in front of the jury. The prosecution then made a closing argument informing the jury that the state had proven aggravating circumstances, and the law required a sentence of death - to which defense counsel failed to respond. The jury was inescapably left with the impression that - now that defense counsel has heard the state's case, there is nothing to say to refute it. Therefore the fact that Dice put forth some possible mit-



igation proof in the guilt phase,[19] or made an opening statement is irrelevant, since this occurred before the prosecution's penalty phase case and could not in any way counter the jury's impression that no case for life existed. In the same way, the objection to the photographs, which occurred completely outside the jury's presence (J.A. 41), could have in no way countered the jury's impression that no case for life existed. The jury had no idea John Dice was interposing an objection.[20] The Bronze Star reference was elicited on cross examination of the state's penalty phase witness (J.A. 30-31). Yet John Dice did not admit this proof, rather the proof was admitted by the state. The reference is also worthless as mitigation proof without some argument to the jury or some testimony indicating what a Bronze Star is, or why it is mitigating.

None of the reasons offered by petitioner change the fact that the jury heard no case for life - rather they heard counsel concede to the prosecution's case for death.

5. *This Court's precedents do not justify applying Strickland rather than Cronic in a case where a lawyer utterly failed to make a case for life in the penalty phase of a capital trial.*

This Court has not until now considered a case where a lawyer is physically present during the penalty phase of a capital trial but fails to contest the prosecution's

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[19] As discussed *supra*, the jury could just as easily have interpreted the guilt phase proof that Cone was a crazed drug addict as an aggravating circumstance. Also, counsel's failure to clear up the taint of the prosecution's improper argument that Gary Cone was not a drug user, rendered the guilt phase proof of little value as mitigation evidence.

[20] Dice simply asked to approach the bench, and the jury was then excused before the objection was argued. (J.A. 41)

case for death and muster some case for life. Petitioner cites several post-*Strickland* cases which he argues are analogous to the present case and warrant applying the *Strickland* test to Cone's case. But all the cases cited by Petitioner involve "specific errors and omissions...[as] the focus of a claim of ineffective assistance" on the part of a lawyer who was otherwise engaged and active as an advocate throughout the sentencing proceeding. *U.S. v. Cronic*, 466 U.S. at 657 n. 20. None of this Court's previous *Strickland* cases involved a lawyer who failed to present mitigation proof and waived closing argument in a capital sentencing proceeding. Gary Cone's case presents this Court with a far more pervasive abdication of advocacy than in this Court's previous *Strickland* cases, and is thus distinguishable from those cases referenced by Petitioner in which this Court applied a *Strickland* prejudice analysis to the penalty phase of a capital trial.

In *Strickland v. Washington*, petitioner claimed trial counsel to be ineffective during the penalty phase of a capital trial by failing to request a pre-sentence report, failing to introduce a psychiatric report, and failing to investigate and present character witnesses. *Strickland*, 466 U.S. at 675. Trial counsel made a closing argument presenting to the court his client's remorse and acceptance of responsibility by turning himself in as the perpetrator of a previously unsolved crime that had been erroneously ruled an accident. *Id.* at 673. Counsel argued that his client had no history of criminal activity, and that his crimes were committed under the extreme mental or emotional disturbance. *Id.* at 673-674. He further argued that his client should be spared death because he offered to testify against a co-defendant, and he was a fundamentally good person who had briefly gone badly wrong in extremely stressful circumstances. *Id.* at 674. Counsel



provided a plausible reason for choosing not to request a pre-sentence report, since it would contain his client's extensive record, which he had successfully moved to exclude from evidence. *Id.* at 673. These facts differ qualitatively from the penalty phase in Gary Cone's case where the jury heard no argument after the prosecution's case as to why Gary Cone's life should be spared.

*Darden v. Wainwright*, also involved allegations of specific attorney error in the penalty phase. *Darden*, 477 U.S. 168 (1986). In *Darden*, defense counsel made a closing argument asking for mercy; and counsel put his client on the stand in the penalty phase to testify. *Darden*, 477 U.S. at 182, 186. *Darden* did not even address the question of whether prejudice had to be proven, since the court found counsel's performance reasonable. *Id.* at 187.

In *Burger v. Kemp*, 483 U.S. 776 (1987), this Court was confronted with a case raising ineffective assistance of counsel for failure to present evidence in the penalty phase of the trial. *Burger*, 483 U.S. at 788. Yet in *Burger* there is no claim that counsel failed to make a closing argument, a fact critically different than in Gary Cone's case. Furthermore, the *Burger* Court never addressed the issue of prejudice, since this Court found that counsel's performance was not deficient. *Id.* at 795-796.

This Court's latest case concerning ineffective assistance of counsel at the penalty phase, *Williams v. Taylor*, raised claims of trial counsel's failure to investigate and develop proof of mitigating evidence of childhood abuse, borderline retardation, and positive behavior in prison. *Williams v. Taylor*, 529 U.S. 362, 395-396 (2000) Unlike Cone's case, trial counsel in *Williams* presented penalty phase proof, including the testimony of Williams' mother, two neighbors, and psychiatric proof. *Id.* at 369. Williams' counsel made a closing argument

asking the jury to consider the fact that Williams turned himself in, and admitting his involvement in four crimes that otherwise would not have been solved. *Id.*

Petitioner also cites two Sixth Amendment cases concerning the failings of counsel on appeal, both of which are distinguishable. In *Smith v. Robbins*, an appointed attorney representing a second degree murder defendant on appeal concluded there were no non-frivolous issues to pursue in the appellate courts. *Smith v. Robbins*, 528 U.S. 259, 267 (2000). The attorney filed with the California Court of Appeals a non-merits brief that complied with applicable California law. The main issue before this Court was whether the California Rule was constitutional which instructed counsel how to proceed on appeal if counsel believed all appellate issues would be frivolous. The holding in *Robbins* dictates that the California procedure does not deny criminal appellants the right to counsel. *Robbins*, 528 U.S. at 276. The Court then indicated there was still an issue in the case as to whether the attorney erred in finding all potential appellate issues frivolous, and remanded the case with instructions to analyze the attorney's performance under *Strickland*. *Robbins* is distinguishable from Gary Cone's case since *Robbins* had an active attorney who searched the record for meritorious issues on appeal, and upon finding none filed a non-merits brief that complied with California law. The attorney thus actively pursued his client's interest. While it is conceivable that an appellate attorney in a typical felony case may find no non-frivolous issues to appeal, it is not conceivable that a capital defense attorney can make no case for the client's life in the penalty phase. The appellate attorney who reviews the record and finds no meritorious issues on appeal due to exemplary trial representation, does not abandon all advocacy by complying with state law



and informing the court of these facts. After all, a defendant has no constitutional right to present frivolous issues for appellate review. Rather, such actions would demonstrate a conscientious attorney, aware of her obligation not to present the court with frivolous issues.

On the other hand, there is no professionally acceptable reason to fail to make a case for life in the penalty phase, even if the case at a minimum focuses on asking the jury for simple mercy. *Robbins* is thus distinguishable since the appellate attorney in *Robbins* did not abandon advocacy, even though he filed a non-merits brief, whereas Gary Cone's attorney did abandon advocacy in the penalty phase.

In *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), this Court considered how to evaluate a claim of ineffective assistance of counsel for failure to file a notice of appeal. The facts in this case are somewhat peculiar, since the defendant pleaded guilty to second degree murder, then claimed his counsel was ineffective for not filing a notice of appeal. *Roe*, 528 U.S. at 473-474. The primary thrust of the *Roe* opinion was to reject the Ninth Circuit's bright line rule that the Constitution required counsel in a criminal case always either (1) to file a notice of appeal, or (2) to discuss the possibility of appeal with the defendant. *Id.* at 478 The Court noted that in such circumstances as a guilty plea, it is difficult to say counsel acted professionally unreasonably by not consulting with the client about an appeal. *Id.* at 479.

Interestingly, *Roe* held that the *Strickland* test governs counsel's failure to file a notice of appeal, but the Court adopted an unusual rule for "prejudice." One would think the test for prejudice resulting from failure to file a notice of appeal would be whether there were any non-frivolous issues available to appeal. Yet the Court remarkably held that prejudice in this case is

whether, had the defendant known of his right to appeal, he would have taken it:

> Accordingly, we hold that, to show prejudice in these circumstances, a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed.
>
> *Roe*, 470 U.S. at 484

Though the Court states it applied a *Strickland* test, the test enunciated looks far more like a *per se* presumption of prejudice than a *Strickland* type analysis. After all, in order for there to be deficient performance, the attorney has to fail to file a notice of appeal (1) against the client's express wishes, or (2) when it is obvious that a client would want to appeal. Demonstrating the improper failure to file the notice of appeal (i.e. deficient performance) almost necessarily demonstrates *Roe* prejudice. If one applied the *Roe* prejudice test to Gary Cone's case, the analysis would be whether Gary Cone, had he known his lawyer was planning to fail to make a case for his life by not presenting proof and not making a closing argument, would Cone have consented to these tactics. Under the *Roe* test Gary Cone has proven prejudice since (1) he was not consulted by Dice with regard to failing to make a case for life, and (2) no reasonable grounds exist for failing to make a case for life in the penalty phase of a capital case.

*Roe* also did not involve a total abdication of advocacy. Recall that the issue in *Roe* centered around an attorney who failed to file a notice of appeal following the defendant's guilty plea. As this Court stated, it is not necessarily professionally unreasonable to fail to consult with a client about an appeal following a guilty plea. One could reasonably expect that the guilty plea concluded



the case. Granted, there are some cases where failing to file a notice of appeal could be a total abdication of advocacy, such as the failure to file a notice of appeal after a capital trial where the defendant has been sentenced to death - but those facts were not before the Court in *Roe*.

Finally, *Roe* reaffirms the rule of *Cronic* that prejudice will be presumed if there is a *constructive* denial of counsel:

> In some cases, however, the defendant alleges not that counsel made specific errors in the course of representation, but rather that during the judicial proceeding he was - either actually *or constructively*-denied the assistance of counsel altogether. "The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage." *Cronic*, *supra*, at 659... Under such circumstances, "[n]o specific showing of prejudice [is] required" because "the adversary process itself [is] presumptively unreliable." *Cronic*, *supra*, at 659.
>
> *Roe*, 528 U.S. at 483 (emphasis supplied)

Gary Cone's case presents a defense attorney who ceased to function as an advocate at the sentencing hearing. The jury never heard why the mental health evidence they had just found insufficient to support a defense of amphetamine psychosis nonetheless could count as mitigation and justify a life sentence. No coherent argument to save Gary Cone's life was presented to the jury, discussing his service to his country. The jury was left with an impression that defense counsel simply was at a loss to respond to the state's case for death. Gary Cone's sentencing hearing thus was qualitatively different than the cases cited by petitioner.

## III. IF THE COURT CONCLUDES THAT THE SIXTH CIRCUIT ERRED IN GRANTING HABEAS RELIEF UNDER *CRONIC*, IT SHOULD REMAND THIS CASE TO THE COURT OF APPEALS FOR CONSIDERATION OF GARY CONE'S SIXTH AMENDMENT CLAIMS UNDER *STRICKLAND*.

Because the Sixth Circuit resolved Cone's ineffective assistance of counsel claims by relying upon *Cronic*, it was unnecessary for that court to consider how Cone's ineffective assistance of counsel claims should be resolved under the two-pronged test of *Strickland v. Washington*. This Court does not ordinarily pass upon questions that were not considered and decided by the lower courts. *See*, e.g. *Gilbert v. Homar*, 520 U.S. 924, 935-936 (1997); *Wright v. West*, 505 U.S. 277, 297 (1992). If therefore, this Court concludes that *Strickland* provides the Sixth Amendment rule applicable to Cone's circumstances, it should remand this case to the Sixth Circuit to apply *Strickland's* two pronged test to the record facts.

Such a disposition would be required by Supreme Court Rule 14.1(a) which states "Only the questions set out in the petition [for certiorari], or fairly included therein, will be considered by the Court." The certiorari petition here raised solely the questions (1) whether the Court of Appeals had improperly applied a *de novo* standard of review in alleged contravention of 28 U.S.C. §2254(d), and (2) whether the Court of Appeals had improperly bypassed the rules of *Strickland* by deciding Cone's Sixth Amendment claim under *Cronic*. No question of the proper application of *Strickland* itself to the facts of this record is subsumed in either of these questions presented.

There are additional reasons why a remand to the Sixth Circuit to apply *Strickland* to the facts in this case



is particularly appropriate if Cone's ineffective assistance of counsel claim is not resolved in his favor under *Cronic*. First of all, in analyzing Cone's ineffective assistance of counsel claim under *Strickland*, the District Court below used an incorrect legal standard. The District Court took the view that *Lockhart v. Fretwell*, 506 U.S. 364 (1993) had qualified *Strickland* - precisely the same error that the Supreme Court of Virginia made in the (Terry) *Williams* case (Pet. App. 78-80):

> "Thus an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was found fundamentally unfair, or unreliable, is defective." *Fretwell*, 506 U.S. at 369.
>
> (Pet. App. 79)

In *Williams v. Taylor*, this Court held the Virginia Supreme Court's decision was contrary to clearly established federal law "to the extent that it held that our decision in *Lockhart v. Fretwell*....somehow modified or supplanted the rule set forth in *Strickland*." *Williams*, 529 U.S. at 413. The Virginia Supreme Court's decision was contrary to *Strickland* because the Virginia Court also required a showing that the result of the criminal proceeding was fundamentally unfair or unreliable. *Williams* 529 U.S. at 414.

Dissenting in *Williams*, the Chief Justice noted that the Virginia Supreme Court did also inquire into whether *Williams* had demonstrated prejudice under *Strickland* and found none. *Williams*, 529 U.S. 417-418. But, as Justice O'Connor notes in her opinion:

> It is impossible to determine, however, the extent to which the Virginia Supreme Court's error with respect to its reading of *Lockhart* affected its ultimate finding that *Williams* suffered no prejudice.
>
> *Williams* 529 U.S. at 414 (O'Connor concurring)

Thus, even though the Virginia Court arguably analyzed Williams' claims under *Strickland* as well, a remand was necessary for consideration under the proper rule. The same rationale applies in this case. The Sixth Circuit never addressed the District Court's erroneous application of *Fretwell* since the Sixth Circuit decided this case under *Cronic*. The District Court's flawed *Strickland* analysis of Cone's ineffective assistance of counsel claim should be subjected to appellate review, and the Court of Appeals is the proper forum to conduct such review in the first instance. *Ylst v. Nunnemaker*, 501 U.S. 797, 806 (1991).

The District Court also took the view that federal habeas analysis of Cone's Sixth Amendment claim was limited to counsel's failing to present or argue the mitigating evidence which trial counsel had in hand. (Pet. App. 55-64, 79) This restriction was based upon a holding that Cone's complaint of counsel's inadequate investigation of mitigating circumstances was procedurally defaulted. (Pet. App. 79)[21] The procedural default ruling was in turn based upon a finding that the Tennessee courts had invoked an adequate and independent state ground when they dismissed an ineffective assistance claim including allegations of inadequate investigation

[21] *See e.g.*, R71, Petition for Writ of Habeas Corpus, ¶40a (failure of counsel to investigate Cone's background) ¶40b (failure of counsel to secure adequate expert assistance), ¶40d, ¶40e, ¶40f, ¶40n, ¶40oo.



of mitigating circumstances, presented in Cone's second state post conviction petition, on the theory that such a claim had been "previously determined" in Cone's first post conviction proceeding. The state court in ruling upon Cone's first post conviction petition rejected an ineffective assistance claim that did not include allegations of inadequate investigation. *Cone v. State*, 927 S.W. 2d 579, 581-582 (Tenn. Cr. App. 1995). (Pet. App. 55-62)

Both in the state courts and in the federal courts below, Cone argued that preclusion of the inadequate investigation components of his ineffective assistance of counsel claim was not based upon an adequate and independent state ground because it was only in Cone's own case that the Tennessee Courts first construed the "previously determined" clause of the applicable Tennessee post conviction statute[22] as applying to previously unraised aspects of a general claim previously raised in other aspects. *Cone v. State*, 927 S.W.2d 579, 581-582 (Tenn. Crim. App. 1995). This construction was therefore not firmly established at the time it was applied to Cone. *Ford v. Georgia*, 498 U.S. 411, 425 (1991). "Novelty in procedural requirements cannot be permitted to thwart review in ...[federal court] applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." *Id.* at 423, quoting *N.A.A.C.P. v. Alabama ex rel Patterson*, 357 U.S. 449, 457-458 (1958). *See also Lee v. Kemna*, 70 USLW 4104 (U.S. Jan. 22, 2002). Though the District Court rejected this analysis (Pet. App. 55-62), the procedural default issue surrounding some of Gary Cone's Sixth Amendment claims was never ruled upon by the Sixth Circuit. Since much of what the

[22] Tenn. Code Ann. §40-30-112(a) (1990) (repealed) (A ground for relief is "previously determined" if a court of competent jurisdiction has ruled on the merits after a full and fair hearing.)

District Court held procedurally defaulted would be directly relevant to establishing prejudice under *Strickland*, a *Strickland* prejudice analysis could not be applied in this case until the procedural default question is decided. This precise procedural default question was not addressed by the Sixth Circuit in light of the court's granting relief under *Cronic*.[23]

Furthermore, Cone had "cause" for any procedural default of a claim of ineffective assistance of counsel based on counsel's investigative failings because, at the time of Cone's first state post conviction proceeding, state law barred any allowance of funds for investigative or expert assistance to develop such a claim or any other grounds for post conviction relief. *Teague v. State*, 772 S.W. 2d 915, 927 (Tenn Cr. App. 1988) (capital post conviction petitioner not entitled to funds). The right to funding for expert and investigative assistance in state capital post conviction proceedings only became available in 1995, nearly a decade after Gary Cone's first post conviction petition was filed. *See Owens v. State*, 908 S.W. 2d 923, 929 (Tenn. 1995). Cone thus cannot be faulted for failing to develop these claims in the state courts. *See (Michael) Williams v. Taylor*, 529 U.S. 420, 432 (2000). Again, though these arguments were rejected by the District Court, they were never addressed by the Sixth Circuit in light of its granting sentencing relief under *Cronic*. Because the claims held by the District Court to be procedurally defaulted bear directly on proof

[23]The Sixth Circuit did address a separate procedural default issue concerning whether other particular claims raised in Cone's second post conviction petition were waived under state law, in light of the language in the Tennessee Post Conviction Statute requiring a waiver of a claim to be knowing and understanding. (Pet. App. 23-26) *see* T.C.A. §40-30-112(b) (1990)(repealed). The argument discussed here, however, was not addressed by the Sixth Circuit.



of prejudice under *Strickland*, they must be considered before a *Strickland* prejudice analysis is undertaken.

The proper consideration of all of these facets of Cone's ineffective assistance of counsel claim under *Strickland* requires detailed analysis of the interplay of Tennessee state law with the relevant procedural default rules, and the Sixth Circuit is the proper forum to conduct such an analysis. *See, e.g. Selvage v. Collins*, 494 U.S. 108, 110 (1990); *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 511 (1986). *See also, U.S. v. Cronic*, 66 US at 666-667 (Case remanded to Tenth Circuit to conduct *Strickland* type analysis).

## CONCLUSION

For the reasons set forth herein, the judgment of the United States Court of Appeals for the Sixth Circuit should be affirmed.

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